Supreme Court
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In The

Supreme Court of the United States

KAU-KAU TAKE HOME,

Petitioner,

v.

CITY OF WICHITA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a substantial diminution of investment-backed expectations owing to a loss of previously enjoyed access by a landowner is entitled to a modification of the Takings analysis where there has been no physical occupation or destruction of the land.

2. Whether a state highway realignment that causes greatly increased difficulty of route and circuitry of travel to a fast food restaurant is a taking of property without due process of law and just compensation under the Fifth Amendment of the U.S. Constitution if a substantial diminution in value occurs disproportionately to that property as compared to the public as a whole due to the unique nature and placement of the property.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Kau-Kau Take Home No. 1, Inc., and Peggy Schoenhofer state that Kau-Kau Take Home No. 1 is a privately held corporation. Non of its shares is held by a publicly traded company. It is held out to the public as a Kentucky Fried Chicken Franchise.

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OPINION BELOW

The Kansas Supreme Court's opinion of June 9, 2006 held that there was not a taking of property without the need to compensate the property owner.

JURISDICTION

The Kansas Supreme Court filed its decision on September 19, 2006, Appendix 1-14 denying a rehearing on the Plaintiff's Motion for Rehearing, Appendix 15, letting stand its decision. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the state law *et seq.* decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Plaintiffs filed an action against the City of Wichita in inverse condemnation, alleging, *inter alia*, that the City, in implementing a highway construction project on the south side of Wichita (New U.S. 54/Kellogg) excessively cut off access to Plaintiffs' real estate during construction, used portions of the Plaintiffs' real estate without permission or lawful excuse during the construction and left the Plaintiffs' real estate with unreasonable access to the system of highways in the State of Kansas.

A certain amount of Discovery was done, after which the Defendant moved for Summary Judgment, and filed, along with its Motion, Statement of Uncontroverted Facts.

In response, the Plaintiffs filed a response to the Defendant's Motion of Summary Judgment along with their own Statement of Uncontroverted Facts. An appeal to the Supreme Court of Kansas was taken upon the granting of four of five counts of the Defendant's Motion for Summary Judgment.

Plaintiffs had affidavits done for their response to the Defendant's Motion for Summary Judgment. These affidavits included those by Steve Worley, a Civil Engineer since

1985, and Lee Jones, an appraiser since 1972. An affidavit was also obtained from an officer in the Plaintiffs' corporation, Peg Schoenhofer. Worley and Jones had also made reports which were incorporated by reference into Plaintiffs' Statement of Uncontroverted Facts by use of affidavits noted above.

The subject property was located at 8725 W. Irving, Wichita, Sedgwick County, Kansas. It was used for the commercial purpose of a Kentucky Fried Chicken franchise (KFC).

Briefly put, customers could access the Subject Property by using Irving Road, an east-west street south of East Kellogg which intersected with Tyler Road and served as the south frontage road prior to the Tyler and Kellogg construction project.

Generally, retail-oriented developments such as shopping centers, discount stores, restaurants, banks, service stations, and convenience stores often locate adjacent to busy streets in order to attract motorists already driving on the street.

Before the roadwork, the subject property could see both the north and southbound traffic on Tyler, and traffic on both east and west sides of Tyler, making the subject's location very prominent.

While it is true that the real estate owned by the Plaintiffs did not extend to Tyler, the intervening land was not developed and had nothing built on it, which allowed for the visibility and made it in essence a corner property.

The Plaintiffs' main lunch and supper hour source of patronage was the Bombardier plant.

The restaurant did a respectable business. In its last full year before the road construction, it grossed over $550,000.00.

The project plans called for several changes in the roads next to the Subject Property. Irving Road was severed from Tyler and no longer functioned as a frontage road. Access to Irving is now provided from East Kellogg approximately 130 meters east of Tyler Road. KFC is now the sole property at the end of a dead end street which stubs off at Irving Road. New routes to and from the KFC are complex and travel time and distance have in some cases significantly increased.

The Bombardier plant, is now effectively prohibited, due to time constraints, from going to the Plaintiffs' property for lunch. Traffic from Bombardier to subject property virtually stopped.

The distances now required to patronize Plaintiffs' property has increased to a great degree. In fact, some of the travel distances to Plaintiffs' real estate have increased by almost two miles, and many new routes are complex. In at least one instance, because of the need to merge and cross traffic to ingress at the Plaintiffs' property, one new route required is now potentially dangerous.

While the construction is complete, sales have not improved since construction was completed. The public cannot reach Subject Property easily from Tyler, and the public traveling must exit from Kellogg at points where the KFC is not visible.

The effect of the construction has been marked. Construction started in 2002, and there has been a decline

in gross sales (as well as net profit) from before the construction to during and after as follows:

Gross Sales

A. 2001: $550,156.00

B. 2002: $455,599.00

C. 2003: $123,912.00

D. 2004: $123,912.00

E. First Quarter, 2001: $136,923.00

F. First Quarter, 2005: $40,790.00

Because of this, there has been a substantial decrease in the fair market value of the business, $290,000.00 according to Lee Jones, appraiser.

As a result of the changes in the road systems, the Highest and Best Use of the subject property as an improved restaurant is now over.

As a further result, because of the changes in the intersection, and the fact that it is not easily accessible to get in and out, which is a must to get a franchise. The restaurant does not meet the specification of a KFC franchise.

The property, according to the Jones report showed that after the construction was " . . . at a unique disadvantage . . . " in that the businesses on all other corners" . . . all have good access to travel in all four directions from the Tyler & Kellogg/U.S. 54 intersection by virtue of access to Tyler after the taking. The subject does not . . . "

There are many other fast food restaurant options in the area that do not have these particular problems. At the

Tyler/Kellogg intersection, other businesses that are not fast food restaurants, are doing well; they have four corners to enter and exit in all four directions. They are as they were prior to construction.

After the construction, " . . . [T]he access provided to KFC is substantially different than what is provided to other businesses. The only properties with similar access restrictions are unimproved properties on Maize Road." Worley Report, ¶ 9, ROA 95.

REASON FOR GRANTING THE PETITION

I. THIS COURT SHOULD RECOGNIZE AND ELUCIDATE THE DIFFERENCE BETWEEN A SUBSTANTIAL DIMINUTION DUE TO LOSS OF ACCESS ALREADY ENJOYED VERSUS A SUBSTANTIAL DIMINUTION FOR OTHER INVESTMENT-BACKED EXPECTATIONS, ESPECIALLY WHERE THE BURDEN FALLS DISPROPORTIONATELY ON ONE PARTY.

The United States Supreme Court has held in a long line of cases that within the analytical framework of a taking there are three factors: (1) the nature of the governmental action, (2) the severity of the economic impact, and (3) the degree of interference with a plaintiff's "reasonable investment-backed expectation." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Fund for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

In the instant case, it is conceded that there was no physical occupation of the property, and that the defendant did not destroy any of the property. The measure in

regulatory takings compares the value that has been taken with the property with the value that remains in the property. *Concrete Pipe*, 508 U.S. at 644. In this instance, the whole physical property remains, but the whole physical property now has considerably worse access than it did before.

The second factor listed by *Concrete Pipe* is the severity of the economic impact. Justice Souter noted at 508 U.S. at 645, that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L. Ed. 303 (1926) (approximately 75% diminution value) and *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915) (92.5% diminution).

In the instant case, while the fair market value was not part of the record, what was part of the record was the fact that the gross sales had dropped some 85%, and that the highest and best use for the property had changed. The Petitioner would have to concede that this factor by itself does not meet the test for taking since it is a mere measure of diminution, however substantial.

The third factor is the "degree of interference with . . . reasonable investment-backed expectations." *Concrete Pipe*, 508 U.S. at 645. In this particular case, we are dealing not with the interference placed upon pension plans or (concrete pipe) or future ability to develop property, like in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

In *Lucas*, the court also looked at taking analysis, and cited that there were "two discrete categories of regulatory action as compensable without case-specific inquiry in the

public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first one is physical invasion, the second is where the "regulation denies all economically beneficial or productive use of land."

In *Lucas*, 505 U.S. at 1019, the court fixed upon the sacrifice of "all economically beneficial uses in the name of the common good." Neither is the case here.

The court pointed out the fact that in some cases it has been noted that this analysis means that if 100% of the property value is taken, that person receives 100% of its value. Whereas in the same sort of case, a person whose value has been reduced 95%, gets nothing. The court went on, however, to state as follows, "Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "(T)he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectation' are keenly relevant to takings analysis generally," citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978). *Lucas*, 505 U.S. at 1019 n.8.

This is what the Petitioners seek.

In the case at bar, the Petitioners believe first that the fact that the investment-backed expectations in this case are those dealing with previously used highway access, which has been recognized as a jumping off point provides an extra level of protection, more than that afforded by the ordinary *Penn Centarl* analysis.

Thus, "the general test of whether a restriction is so excessive as to result in a substantial diminution of

property value must be applied in *conjunction* with those cases which have specifically dealt with the right of access. *Johnson v. United States*, 202 Ct. Cl. 405, 479 F.2d 1383, 1390 (Ct. Cl. 1973) (Emphasis supplied).

Where is a presumption if a petitioner already has a "right of access" that this is a right which can be taken away, compared to the business expectations in other sorts of cases. In the *Johnson* case, "the abutter's easement entitles him to some means of access from the adjoining highway, but such owner cannot insist on the right of ingress and egress in any place he sees fit." *Johnson*, 479 F.2d at 1391.

In those situations where "reasonable regulations and restrictions have been imposed upon the abutting owners, which obstruct portions of their access, yet do not totally deprive such owners of access, the question becomes one of whether there remains a reasonably convenient and suitable alternative means of access under all the existing facts and circumstances." *Johnson*, 479 F.2d at 1391. If there does not, there is a taking.

In order to determine whether there remains "a reasonably convenient and suitable alternative means of access under all the existing facts and circumstances," is a consideration of " . . . whether the partial deprivation is resulted in a substantial diminution of value of the property, which, as noted previously, is also determinative of whether a regulation is so excessive as to constitute a taking." *Johnson*, 479 F.2d at 1391.

In the case at bar, the property owner suffered an 85% diminution in *gross* sales. It must be conceded by all that such a diminution is staggering. Further, these are not simply opinions of value, which might contain elements of

opinion, or net profits which might be subject to some sort of accounting analysis, faulty or otherwise, but these are gross sales diminished under the same ownership of the same KFC franchise.

There is a second reason why the Petitioners believe that they have an extra layer of protection in the *Penn Central* analysis. The Petitioner is the only one at the corner of the intersection who was completely shut off from direct access and, so, the Petitioner had a special status.

The burden has fallen much more heavily upon the Petitioner than other persons who had problems with access. In the Kansas case, *Small v. Kemp*, 240 Kan. 113, 727 P.2d 904 (1986), the owner of an animal clinic brought action against State for loss in property value due to relocation of frontage road. The Kansas Supreme Court held that damages which are different in *kind* and not just in *degree*, causing a taking. The Court went on to hold in *Small*, as in the case at Bar, that the damages were not in fact sufficient for a taking.

The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." U.S. Constitution, Amendment V. On its face, the Clause contemplates that "just compensation" is due when "private property" is taken for a "public" use. The Clause, then is intended to provide compensation precisely when property is taken through lawful procedures for the genuine benefit. As Justice Holmes put in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922), "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the

change. *Id.* at 416. As Justice Black explained in *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960). "The Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 49.

As the former Court of Claims later characterized it in *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981) the Supreme Court "crystallized its thinking" in *Agins, Id.* at 1213 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980)). The Court offered the following summary:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.* is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owners' land, the Court held that the zoning laws were facially constitutional. They bore a *substantial relationship to the public welfare*, and their enactment *inflicted no irreparable injury upon the landowner*, 447 U.S. at 260-61. (internal citations omitted) (emphasis added).

Finally, one must keep in mind the statement of Judge Loren Smith in *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 23-24 (1999):

> The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breath, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Thus Petitioner believes that the combination of 85% loss in the gross sales combined with (a) the fact that this is an access case where Plaintiff not only had the right to own a business, but actually had a business, and had not only a right to access, but actually had access, with (b) the fact that the Petitioner suffered damages which differed not only in degree, but also in kind from others, means that this court should find there was a taking.

CONCLUSION

The Court should grant the petition for a Writ of Certiorari and reverse the decision of the Kansas Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF KANSAS

No. 94,869

KAU KAU TAKE HOME NO. 1, *et al.*,

Appellants,

v.

CITY OF WICHITA

Appellee,

SYLLABUS BY THE COURT

1. Damage to private property caused by contractors working on a public road construction project does not support a cause of action for inverse condemnation if the damage is not necessary to complete the road construction project.

2. Any person with a claim against a municipality under the Kansas Tort Claims Act must file a written notice of the claim with the municipality. The filing of a proper notice of claim is a prerequisite to filing an action in the district court against a municipality. These notice requirements are jurisdictional. If the statutory notice requirements are not met, the court cannot obtain jurisdiction over the municipality.

3. An abutting property owner has no right to the continuation of a flow of traffic from nearby highways to the owner's property. The regulation of traffic flow does not involve a taking if it furthers the government's police power to promote the safety, peace, health, morals and general welfare of the people.

4. State action resulting merely in a diminution in property value is not a taking.

5. Under the facts of this case, increasing the driving distance between a landowner's property and nearby roadways is not a compensable taking.

Appeal from Sedgwick district court; MARK A. VINING, Judge. Opinion filed June 9, 2006. Affirmed.

Joseph R. Borich, III, argued the cause and *James B. Jackson* was with him on the brief for the appellants.

Douglas J. Moshier, senior city attorney, argued the cause and *Gary E. Rebenstorf,* city attorney, was with him on the brief for the appellee.

ROSEN, J: Kau Kau Take Home No. 1, Inc., and Peggy Schoenhofer (Appellants) appeal the denial of their claims for inverse condemnation against the City of Wichita (City). Appellants operate a Kentucky Fried Chicken restaurant located on West Irving Street southeast of the intersection of Tyler Road and Kellogg (U.S. Highway 54) in Wichita. Tyler Road is a two-way street running in a north-south direction. Kellogg/US 54 is an access-controlled highway running in an east-west direction. West Irving Street is a two-way street, generally running in an east-west direction on the south side of Kellogg and the east side of Tyler Road. Appellants' property accesses West Irving Street via two entrances directly onto West Irving Street. Appellants' property does not have direct access to either Tyler Road or Kellogg/US 54.

In 2002, the City of Wichita began a construction project to reconfigure and reconstruct the intersection of Tyler Road and Kellogg/US 54. Prior to the City's project, West Irving Street intersected Tyler Road just south of the intersection of Tyler Road and Kellogg/US 54 and a few hundred feet west of the Appellants' property. The City's

project eliminated the intersection between Tyler Road and West Irving Street, causing West Irving Street to dead-end just west of the Appellants' property.

Prior to the City's project, patrons could access the Appellants' restaurant from Tyler Road by turning east onto West Irving Street directly from Tyler Road. Patrons on Kellogg could access the restaurant by turning south on Tyler Road then east onto West Irving Street. To leave Appellants' restaurant along Tyler Road or Kellogg/US 54, patrons turned left out of the parking lot and drove a few hundred feet west on West Irving Street to Tyler Road. From Tyler Road, patrons could access Kellogg/US 54.

After the City's project eliminated the intersection of West Irving Street and Tyler Road, patrons approaching the restaurant from Tyler Road must turn east onto East Kellogg Street (the south outer roadway to Kellogg/US 54), to drive past the restaurant, then turn right onto a spur that connects to West Irving Street and backtrack to the restaurant entrance. Patrons traveling west on Kellogg/US 54 are required to exit at the Tyler Road ramp onto West Kellogg Street (the north outer roadway to Kellogg/US 54), follow the U-turn lane to East Kellogg Street, driving past the restaurant, then turn right onto a spur that connects to West Irving Street and backtrack to the restaurant entrance.

The City's project significantly altered the route for patrons leaving Appellants' restaurant. Patrons returning to Tyler Road and westbound Kellogg/US 54 must turn right upon exiting Appellants' parking lot, travel east on East Kellogg Street approximately 1 mile to Ridge Road, turn left, crossing Kellogg/US 54, turn left onto West Kellogg Street, driving west approximately 1 mile to Tyler Road to

the westbound Kellogg/US 54 highway. According to Appellants' expert, the City's project increased the driving distance between Appellants' property and westbound Kellogg/US 54 or Tyler Road by approximately 2 miles.

However, it is important to note that the project did not change either of the Appellants' two points of access to West Irving Street and did not eliminate any direct access between the Appellants' property and Tyler Road because Appellants never had direct access to Tyler Road.

Appellants filed a petition against the City for inverse condemnation, seeking compensation for the temporary and permanent restriction of access to their property. Appellants also sought payment for a temporary easement, claiming that the contractors used Appellants' land for access during the construction of the project. The City filed a motion for summary judgment. The district court granted the City's motion, denying all of Appellants' claims. Appellants bring this appeal directly to us pursuant to K.S.A. 26-504, which allows an appeal directly to the Supreme Court when a district court denies a petition for eminent domain.

For their first claim of error, the Appellants assert that the district court erred when it granted the City's summary judgment motion, denying their claim for a temporary easement. Appellants claim that the contractors, as agents of the City, "trespassed and invaded the real estate of the [Appellants] in the course and scope of their duties to Defendant City, and have used said real estate for their own purposes, including access to other portions of the Project, without permission, and without just cause or excuse, in contravention of the ownership interests of [Appellants]."

In its motion for summary judgment, the City argued that the Appellants' claim sounded in the tort of trespass rather than inverse condemnation. Because Appellants failed to file a notice of claim with the City pursuant to K.S.A. 12-105b, they were precluded from raising a tort claim under the Kansas Tort Claims Act against the City.

Appellants, on the other hand, argue that all eminent domain cases involve trespass or a continuing nuisance. According to Appellants, when the offending acts are committed by private individuals, the claim sounds in tort. However, when the trespass or continuing nuisance is committed by a public body with the power of eminent domain and the purpose of doing public good, the claim must be for inverse condemnation rather than a tort.

"Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *City of Wichita v. McDonald's Corp.*, 266 Kan. 708, 714, 971 P.2d 1189 (1999). An appellate court reviews a summary judgment decision using an unlimited standard of review. 266 Kan. at 714.

ANALYSIS

Inverse condemnation is a cause of action for compensation when a governmental entity takes private property. An inverse condemnation proceeding is initiated by the party with an interest in the private property rather than the governmental entity. Such an action is available when private property has actually been taken for public use without the initiation of formal condemnation proceedings by the governmental taker. To establish a claim for inverse condemnation, a party must establish an interest in the

real property and a taking. *Deisher v. Kansas Dept. of Transportation,* 264 Kan. 762, 772, 958 P.2d 656 (1998).

A compensable taking requires the government to acquire possession as well as the right of possession and control of tangible property to the exclusion of the former owner, with such title in fee or easement as provided by the statute underlying the proceeding. In either a condemnation or an inverse condemnation proceeding, the question of whether there has been a compensable taking is a question of law. 264 Kan. at 772.

In *Deisher,* the plaintiffs filed an inverse condemnation action against the Kansas Department of Transportation (KDOT), claiming that blasting on an adjacent easement for a highway construction project caused the water table to drop and significantly reduced the water level in the Deishers' well. 264 Kan. at 764. The *Deisher* court concluded that the damage to the Deishers' well was not necessary to complete the KDOT project because the State did not need to use Deishers' water or to divert their water to complete the road construction project. Rather, the damage to the well resulted from the negligence of the State or those acting on behalf of the State. Consequently, the Deishers' claim sounded in tort, not inverse condemnation. 264 Kan. at 774.

The *Deisher* analysis applies in this case. Appellants do not allege that the contractors asserted control over the property to the exclusion of the Appellants. The alleged damage to the Appellants' property caused by the contractors driving over the property was not necessary to the completion of the City's project. The alleged damage was caused by the contractor's negligence. Consequently, the

Appellants' claim sounds in tort, not inverse condemnation.

K.S.A. 2005 Supp. 12-105b requires any person with a claim against a municipality under the Kansas Tort Claims Act to file a written notice of the claim with the municipality. The filing of a proper notice of claim is a prerequisite to filing an action in the district court against a municipality. The notice requirements of K.S.A. 2005 Supp. 12-105b are jurisdictional. If the statutory requirements are not met, the court cannot obtain jurisdiction over the municipality. *Myers v. Board of Jackson County Comm'rs,* 280 Kan. 869, 876-77, 127 P.3d 319 (2006).

Appellants admit that they have not filed a notice of claim with the City. Accordingly, the Appellants' failure to provide the statutory notice of claim precludes their relief. The district court properly granted the City's summary judgment motion in regard to the Appellants' claim for a temporary construction easement.

For their second claim of error, the Appellants assert that the district court improperly granted the City's summary judgment motion, denying their claim for a temporary or permanent easement. Appellants claim that they should be compensated for the loss of access to their property on both a temporary and permanent basis. Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Review of a decision granting summary judgment decision is de novo. *McDonald's Corp.,* 266 Kan. at 714.

To establish a claim for an easement based on inverse condemnation, the Appellants must show that they have an interest in the land and that there was a compensable

taking. The City does not contest Appellants' interest in the land. Rather, the City contests the Appellants' assertion that there has been a compensable taking. The determination of whether there was a compensable taking is a question of law. This court reviews questions of law using an unlimited standard. *Eberth v. Carlson*, 266 Kan. 726, 731, 971 P.2d 1182 (1999).

Appellants argue that the compensable taking is the restriction of the right of access to their property. Because patrons must travel further to access their restaurant, Appellants argue that their right of access has been impaired.

"'Right of access' is traditionally defined as an abutting landowner's common-law right of access from the landowner's property to abutting public roads. Such a right is the right to reasonable, but not unlimited, access to existing and adjacent public roads. [Citations omitted.] When the government actually blocks or takes away existing access to and from property, the landowner is generally entitled to compensation." *McDonald's Corp.*, 266 Kan. at 718.

See also *McCall Service Stations, Inc. v. City of Overland Park,* 215 Kan. 390, 396-97, 524 P.2d 1165 (1974) (allowing the property owner to be compensated for the loss in value based on the loss of one of its access points to the abutting highway); *Kohn Enterprises, Inc. v. City of Overland Park,* 221 Kan. 230, 235-36, 559 P.2d 771 (1977) (upholding the reduction in property value based on the elimination of an access point to an abutting highway).

Right of access is distinct from the "regulation of traffic flow" or "circuity of access." *McDonald's Corp.*, 266 Kan. at

718. The regulation of traffic flow, also referred to as "restricted access," is a "limitation or restriction on the landowner's right of access to and from abutting public roads or highways." *Eberth v. Carlson,* 266 Kan. at 734; *McDonald's Corp.,* 266 Kan. at 718. Such a restriction involves the police power of the State. Kansas courts have recognized a city's police power to regulate and restrict the use of public roads to the extent necessary to "'provide for and promote the safety, peace, health, morals and general welfare of the people.' [Citations omitted.]" *Eberth*, 266 Kan. at 734.

An abutting property owner has no right to the continuation of a flow of traffic from nearby highways to the owner's property. *McDonald's Corp.*, 266 Kan. at 718. As long as the regulation is reasonable, the regulation of traffic flow does not involve a taking. *Eberth*, 266 Kan. at 735 (eliminating the landowners' highway cross-over and constructing a new cross-over on nearby land was not unreasonable and did not constitute a taking); see also *Hales v. City of Kansas City,* 248 Kan. 181, 185, 804 P.2d 347 (1991) (installing medians that prevented turning onto the landowner's property was a reasonable exercise of police power and not compensable); *Hudson v. City of Shawnee,* 246 Kan. 395, 403, 790 P.2d 933 (1990) (closing one of the landowner's two entrances onto the abutting street was a reasonable exercise of the city's police power); *Small v. Kemp,* 240 Kan. 113, 727 P.2d 904 (1986) (relocating a frontage road near the landowner's property, eliminating the intersection between the street abutting the property and another street, and causing a circuitous route to landowner's property was a reasonable exercise of police power and not a compensable taking); *Ray v. State Highway Commission,* 196 Kan. 13, 19-20, 410 P.2d 278,

cert. denied 385 U.S. 820 (1966) (replacing landowner's access to limited access highway with access to a frontage road that accessed the highway was not unreasonable and did not amount to a taking); *Brock v. State Highway Commission,* 195 Kan. 361, 370-71, 404 P.2d 934 (1965) (causing circuity of travel by eliminating the landowner's direct access to a limited access highway and constructing a new frontage road for access is not a taking); *Pringle v. City of Wichita,* 22 Kan. App. 2d 297, 917 P.2d 1351 *rev. denied* 260 Kan. 994 (1996) (eliminating the intersection between the street abutting landowners' properties and a main thoroughfare without changing the landowners' entrances was a reasonable exercise of police power and not a taking); *Lewis v. Globe Constr. Co.*, 6 Kan. App. 2d 478, 484, 630 P.2d *179, rev. denied* 230 Kan. 818 (1981) (temporarily closing the road abutting landowners' property for repairs and temporarily blocking access to landowners' parking lots was a reasonable exercise of the police power).

In *McDonald's*, the City of Wichita instituted an eminent domain action for a roadway construction project, seeking a temporary easement for construction and a permanent physical taking of part of Wal-Mart's land. Wal-Mart owned property located at the northeast corner of Dugan Street and West Kellogg Street, the north outer road to Kellogg/US 54. Wal-Mart had two entrances on Dugan Street and two entrances on West Kellogg Street. The City eliminated the intersection of Kellogg and Dugan by installing an overpass without an exit onto Dugan and converted the outer roads on either side of Kellogg/US 54 to one-way rather than two-way roads. After the City's project, Wal-Mart continued to have two entrances on Dugan Street and two entrances on West Kellogg Street.

additional miles to reach Wal-Mart's property. Wal-Mart sought to increase its condemnation award based on the reduction in its property value due to circuity of access. Wal-Mart claimed the City's restrictions to its access were unreasonable.

The *McDonald's* court noted that Wal-Mart had access to the same streets after the construction project, and the City did not close any of the access points to Wal-Mart's property from the adjoining streets. In concluding that Wal-Mart could not consider the restricted access in determining the market value of the property, the *McDonald's* court acknowledged that Wal-Mart would not have had a claim for compensation based on the restriction of its access to public highways. The *McDonald's* court concluded that the exercise of the City's police power to regulate the traffic flow around Wal-Mart's property was not unreasonable and refused to allow Wal-Mart to repackage the "'unreasonable use of the police power' argument" into a valuation claim. 266 Kan. at 720-21, 725.

Other than the procedural posture that distinguishes this case from the *McDonald's* case, the *McDonald's* court's holding that there is no claim for compensation based on a restriction of access to Wal-Mart's property is on point with the facts in this case. The Appellants in this case have the same access to West Irving Street that they had prior to the City's project. The additional 2 miles of travel to access Appellants' property is less than the additional 3 miles of travel that the *McDonald's* court found to be reasonable. Like Wal-Mart, Appellants have failed to establish that the City's regulation of the traffic flow around Appellants' property was unreasonable. Thus, Appellants have failed to establish a compensable taking.

Appellants attempt to analogize this case to *Teachers Insurance & Annuity Ass'n of America v. City of Wichita,* 221 Kan. 325, 559 P.2d 347 (1977). In *Teachers,* the City of Wichita (City) changed Kellogg/US 54 to a fully controlled-access highway. Although the City constructed a service road to run alongside the highway, the service road was not a frontage road with direct access to Kellogg/US 54. Several landowners along Kellogg/US 54 brought a suit for inverse condemnation claiming a loss of access because they had direct access to Kellogg/US 54 before the construction project and no access to Kellogg/US 54 after the construction project. To reach the landowners' property from Kellogg/US 54 after the construction, patrons had to travel on several other streets to reach the service road. The *Teachers* court held that the police action in eliminating the direct access to Kellogg and replacing it with a "tortuous and circuitous route" was not a reasonable exercise of the City's police powers. 221 Kan. at 328, 336. The *Teachers* court distinguished its holding from *Brock* and *Ray* because the landowners in *Brock* and *Ray* were given access to the highway via a frontage road that had direct access to the highway. However, in the *Teachers* case, the City did not provide a frontage road with direct access to Kellogg/US 54. 221 Kan. at 333-34.

Teachers can be distinguished from the facts in this case. In *Teachers,* the landowners had direct access to Kellogg/US 54 before the construction project. After the construction project, the landowners in *Teachers* had no access to Kellogg/US 54 even through a frontage road. Their access to Kellogg/US 54 required travel on several other roads. In this case, the Appellants never had access to Tyler Road or Kellogg/US 54. The Appellants' property had access to West Irving Street both before and after the

City's construction project. Thus, the Appellants did not lose any direct access points. *Teachers* does not support the Appellants' claim for loss of access.

Appellants also argue that this court should consider the substantial impairment of the fair market value of their property. However, Appellants fail to cite any authority for the proposition that the reduction in value constitutes a taking. This court specifically noted that "State action resulting merely in a diminution in the value of property" is not a taking. *Small,* 240 Kan. at 118. In making this statement, the *Small* court relied on *Mugler v. Kansas,* 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887). In *Mugler,* the State forced the closure of a brewery after the approval of a constitutional amendment forbidding the sale and manufacture of intoxicating liquors. The brewery owners argued that the brewery was built before the constitutional amendment and, thus, the forced closure amounted to a governmental taking because it decreased the value of the property. The *Mugler* court concluded that the exercise of the State's police power in prohibiting specific uses of property did not involve a taking regardless of whether there was a decrease in the value of the property. The *Mugler* court stated that the legislation did not "disturb the owner in the control or use of his property for lawful uses, nor restrict his right to dispose of it." 123 U.S. at 669.

Relying on *Mugler,* the *Small* court refused to find a taking because the change in traffic flow around the landowner's property diminished the value of the property. The *Small* court noted that the State's action did not control the use of the property or restrict the landowner's right to dispose of it. 240 Kan. at 119.

The *Small* court's analysis applies in this case. The City's construction project does not control the use of the Appellants' property or restrict the Appellants' right to dispose of the property. Thus, the Appellants' argument that there is a taking based on the reduction in the property value is without merit.

Appellants' claim for inverse condemnation due to a loss of access involves only the regulation of traffic flow. The City's road construction project has not changed the Appellants' direct access to an abutting street. Because the City's regulation of traffic flow near Appellants' property is a reasonable exercise of the City's police power, Appellants have failed to demonstrate a compensable taking. We affirm the district court's order granting summary judgment to the City and denying Appellants' claims for a temporary and permanent easement.

Affirmed.

SUPREME COURT ORDER

DISTRICT CASE NO. 04CV1541SG

IN THE SUPREME COURT OF
THE STATE OF KANSAS

JOSEPH R BORSCH III
7111 W 98TH TERR STE 140
BUILDING 2
OVERLAND PARK KS 66212

CASE NO. 05-94869-S

KAU-KAU TAKE HOME NO. 1, INC.
AND PEGGY SCHOENHOFER, APPELLANT,
V.
CITY OF WICHITA, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY KAU-KAU TAKE HOME NO.1, INC.

CONSIDERED BY THE COURT AND DENIED.

DATE: 09/19/2006.

CAROL G. GREEN
CLERK

ne Court, U.S.
FILED

No. _____

06-896 DEC 8 - 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

KAU-KAU TAKE HOME,

Petitioner,

v.

CITY OF WICHITA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE DISTRICT COURT, SEDGWICK COUNTY,
KANSAS CIVIL DEPARTMENT

KAU-KAU TAKE HOME, NO. 1, INC. and PEGGY SCHOENHOFER, Plaintiffs, vs. CITY OF WICHITA, Defendant.	)	Case No. 04CV1541

JOURNAL ENTRY OF JUDGMENT

(Filed Jul. 6, 2005)

NOW ON THIS 2nd day of June, 2005, this matter comes on for hearing on defendant's Motion for Summary Judgment. The plaintiffs appear by and through their attorneys, James B. Jackson and Joseph Borich. The defendant appears by and through its Senior Attorney, Douglas J. Moshier. There are no other appearances.

WHEREUPON, the court, after listening to the arguments of counsel, reviewing the file and record herein,

and being otherwise fully and duly advised in the premises, finds and concludes as follows:

1. The defendant's uncontroverted facts numbered 1 through 7, 9 and 10 were not controverted by the plaintiffs and they are adopted by the court.

2. The defendant's uncontroverted fact numbered 8, while controverted by the plaintiffs, is not material to the court's decision herein.

3. While defendant's claim that the plaintiff Peggy Schoenhofer is not a proper plaintiff is technically correct, the court believes, in the interest of complete resolution of the issues in this matter, that she should be included as a plaintiff as a matter of permissive joinder.

4. The claims of the plaintiffs concerning repeated, temporary occupation of the subject property by vehicles and persons associated with the defendant's construction of the highway and the Tyler Road intersection are not takings but incidents of trespass.

5. The defendant's first claim regarding the plaintiff Peggy Schoenhofer is denied.

6. The plaintiff's attempt to state a cause of action sounding in tort must fail because plaintiffs did not comply with the provisions of K.S.A. 12-105b(d), a condition precedent to bringing a tort action against a municipality.

7. The plaintiffs have failed to state a cause of action in inverse condemnation for the repeated, temporary occupations of the subject property by vehicles and persons associated with the highway construction because they do not state any

specific dates or times when these incidents occurred.

8. The plaintiffs' claims that the defendant should have constructed the highway and the Tyler Road intersection in a manner that would have had a less negative impact on the subject property do not state a cause of action. This court may not substitute its judgment for the that of the governing body of the defendant.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is granted summary judgment as to all claims of the plaintiffs herein.

IT IS SO ORDERED.

Mark A. Vining
Mark Vining, District Judge

/s/ Joseph Borich
Joseph Borich III, #15234
Attorney for Plaintiffs

/s/ James B. Jackson
James B. Jackson, #14319
Attorney for Plaintiffs

/s/ Kelly J. Rundell
for Douglas J. Moshier,
#08829
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